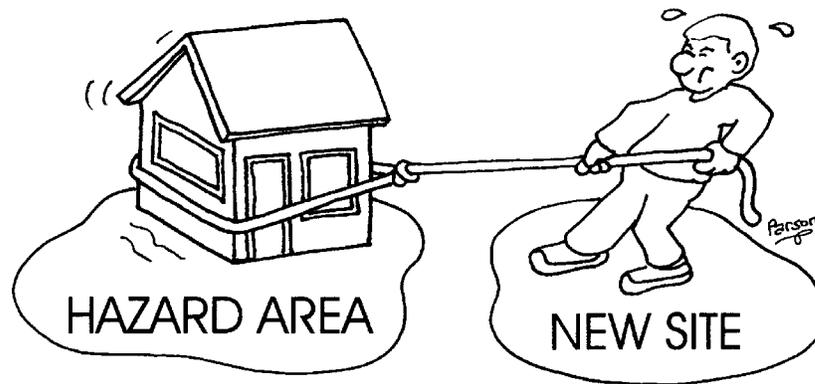


TRANSFER OF DEVELOPMENT RIGHTS PROGRAM IN OREGON

A SENATE BILL 12 MODEL PROGRAM

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Introduction

Oregon's planning process was developed with an interest in protecting life and promoting public safety. Senate Bill 100 the foundation of Oregon's land use, states *"the impact of proposed development projects, constituting activities of statewide significance upon the public health, safety and welfare, requires a system of permits reviewed by a statewide agency to carry out statewide planning goals and guidelines prescribed for application for activities of statewide significance throughout the state"* (SB 100 Part 1(1)(5)). Today, Oregon planning focuses public policy on preservation of farm and timber lands to reduce urban development into rural areas.

Oregon has five areas of land use planning:

Process for land protection involving people

- Conservation and enhancement
- Growth and development management
- Coastal protection
- Coordination between policies and goals



- **Process for land protection involving people:** Oregon land use Goal 1 (Citizen Involvement) and Goal 2 (Land Use Planning) protects the greater community along with establishing how Oregon land use planning operates.
- **Conservation and enhancement:** Oregon's public planning process has identified, using processes developed in Goal 1, forest and agricultural land conservation followed by preservation of open spaces, scenic and historic areas, as activities of statewide importance. Each area of public interest/protection is reviewed through a public land use process that identified public concerns or needs to enhance air, water, and land quality. Recreational and public interests are a reward created by the process and should be considered an asset. As reinforcement to the goal processes, land use conservation includes protecting lives and property which allow the public to focus resources toward natural disasters.
- **Growth and development management:** To improve the state's economy and provide housing, public facilities and services standards. Social growth envelops transportation systems rural and urban impacting development in both social and economic forums.
- **Coastal protection:** It is in the public interest to protect estuaries and wetlands; coastal shorelands, water quality, wildlife habitat; beaches and dunes; and ocean resources.
- **Coordination between policies and goals:** Planning coordination occurs

primarily between two or more issues with a willingness to look toward solutions.

Public Policy

Public Policy as it relates to Senate Bill 12 (SB12) and Transfer of Development Rights (TDRs) promotes “*public safety*” and recognizes “*the consistent treatment and coordination of actions relating to rapidly moving landslides*” (ORS 195.253(3)). This policy and duty of local government mandates reduction of risk and commitment of available authority to protect the public (paraphrased ORS 195.260(a)).

Public safety policy is used synonymous with land use planning. Safety policy, in Oregon, is used to promote planning goals. When these two matters become in conflict with acceptable public interests and/or goal exceptions planning, requests for development add for increased rural density.

As rural density increases, local government needs to address statewide planning goal 14. Yet, like public safety, an overlying premise in decision making, a discussion of land use policy like coastal, estuarine, water, air, and alike is needed. As discussion between these views becomes bound urbanization takes over. With urbanization the degree of populous concentrates environmental effects and removal of persons from rural areas validates the axiom.

Transfer of Development Rights

The history of Transfer of Development Rights (TDRs), in the United States, spans thirty plus years. In 1968, the first legislature approved TDR Program began in New York, New York. The adopted program was incorporated into New York’s Landmarks Preservation Law (Pruetz p. 9).

TDRs, in Oregon, as they refer to SB12 focuses on 1) that area between rural resource lands and urban areas; and 2) on urban area to urban area density transfers. In examining SB12, Oregon land use goals appear to impose a high degree of balance or constraint on conservation issues versus development. Conservation land use issues can and most always include the discussion of public safety.



Findings



Several books are authored on the subject of Transfer of Development Rights (TDRs), each book repeats similar findings. Nearly all literature researched for this paper appears to have used the same sampling of programs. However, the most complete collection of TDR programs reviewed was compiled by Rick Prutez, ACIP.

Mr. Prutez has a professional planning history that spans more than thirty years. Retiring in July 1999, Mr. Pruetz is still involved in land use and TDR implementation planning. In completing research for this paper, Mr. Pruetz was contacted via E-mail and correspondence revealed: *TDR programs are most always tailored to a specific community's wants and needs.* Mr. Pruetz's research concluded, TDR programs that are developed without community input usually fail. Mr. Prutez did comment on Oregon's SB12 program potential saying, *"going from policy to reality can be difficult"* (personal contact Oct. 10, 2000). Other research suggests, TDR programs require some type of legislative authority to enact.

Nationally

Transfer of Development Rights (TDR) programs are used to preserve sensitive lands within the public's interest. Development is transferred via intra or inter development while maintaining ownership or actuating new ownership per credit unit.

Credit units are divergent depending on the wiliness for a community to preserve some specific issue (e.g., air, land, water, historic, cultural, or other resource).

Oregon State

Non-SB12 TDR programs in Oregon are limited to a few jurisdictions, specifically the City of Portland and Deschutes County. There are other jurisdictions attempting to implement a TDR program (e.g. City of Corvallis); yet, because of logistics TDR credits are actually Transfer of Density Credits (TDCs). TDCs are normally use to increase open space on the development lot or parcel. TDCs most always are bound to the same owner. The exception to this would be the TDC program operated by Deschutes County where the county is the primary land development agency.

If the program requires a goal exception process, the process is outlined in ORS 197.732 and can be found via the Internet at <http://landru.leg.state.or.us/ors/197.html>.

On October 23, 1999, an Oregon Legislature approve bill (SB 576 & ORS 94.531) became effective allowing cities and counties to establish transferable development credits.

Current Authority

Research shows each program proposed was developed using either state or local government legislative authority. There were several small programs operating under special needs authority. TDR programs need approval from their respective policy making bodies to withstand judicial tests.



In looking at developing a TDR program under SB12, we find the same needed for legislative authority in ORS 195.266. Additional, legislative authority for TDRs, in Oregon, can also be found in ORA 94.531.

SB12 TDR Program Authority

First, the Oregon Legislature delegated SB12 authority to. SB12 mandates funding authority to the Oregon Department of Land Conservation and Development (DLCD). Local government is directed then upon their choosing to implement a SB12 TDR program. Second, by using assigned authority, DLCD released a grant to Douglas

County to develop a working model TDR program. Upon producing a working TDR program, the program will be given to local government for refinement and potential adoption. Choice of adopting a program will be the final TDR validation for local government authority.



To understand TDRs, a working SB12 TDR program is an alternative land use process that adds value lost by state regulation. Under SB12, in ORS 195.266(1) and 195.275(1), local government has the choice to adopt a TDR program or not. A TDR program reduces the risk of a "takings action" (Suitum v. Tahoe Regional Planning Agency. U.S. Supreme Court No. 96-243).

What Triggers use of SB12 TDRs?

TDRs are used when development inside identified lands called "sending areas" is restricted from development by a geotechnical report. Sending areas are initially identified on Oregon Department of Geology and Minerals Industry maps as "Further Review Areas." A TDR credit when determined available by local government is exercised by the original development property owner or sold to a prospective (alternate) buyer. Exercising a TDR credit requires a negative geotechnical report/land use approval for the sending property, a willingness to transfer development, and SB12 legislative impacted property. Placement or redemption of a credit occurs only in local government identified areas called "receiving areas."

A geotechnical report is a professionally prepared scientific document describing geological conditions in proximity of proposed development.

Receiving areas are lands identified by community consensus that meet some type of community goal or standard. Receiving areas much like TDR program development appear to need some type of legislative approval before implementation. TDR receiving areas also need to be designed to accept new or additional development.

TDRs and SB12

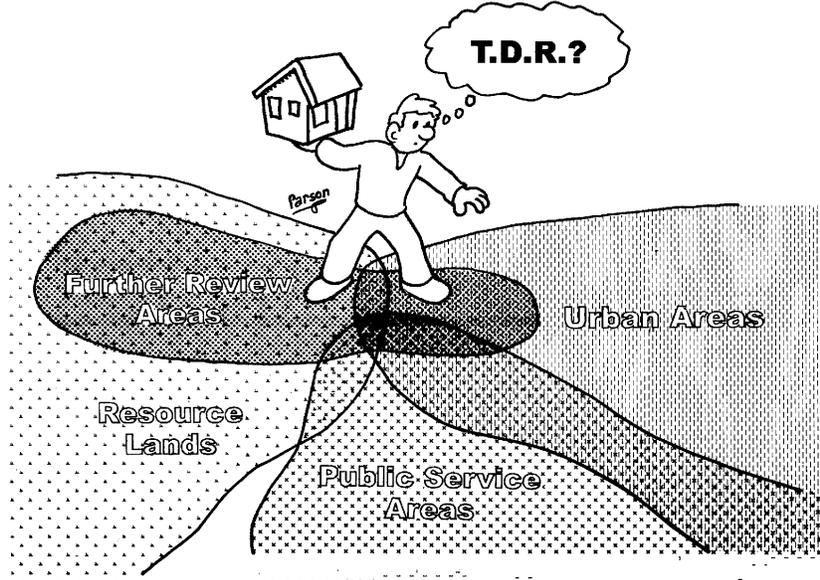
Implementation of any type of SB12 TDR program will require either taking an exception to Goal 14 (ORS 195.266(3)) or exercising an interpretation, option language, within SB12. The strength of this option language will need to be tested before implementing any TDR program can occur.

For reference, precedence to develop an exception is found in *Caine V. Tillamook County*, 22OR LUBA 687 (1992), the Oregon Land Use Board of Appeals (LUBA) found that *“a county can establish that its acknowledged comprehensive plan somehow obviates its obligation under ORS 197.175(2)(a) and 197.835(4) and Goal 14.”* This finding states a county must either amend its comprehensive plan to include the subject property within an urban growth boundary or adopt an exception to Goal 14, before it may plan and zone rural land for urban uses. However, ORS 195.266(3) may trump this section.

ORS 195.266(3) states in the last line, “New dwelling opportunities shall include but need not be limited to a second dwelling opportunity on the same lot or parcel and the creation of additional parcels or lots, provided such new dwelling opportunities and land divisions are allowed under ORS chapters 197, 215, 277, and goals and rules adopted thereunder, but were not allowed by state law or local land use regulations prior to October 23, 1999.”

ORS 195.266(3) means local government can issue a land use decision similar to decisions made prior to October 23, 1999. This interpretation allows local government to set aside changes in goals, such as Goal 14 and it’s Rural Residential Rule. If local government or DLCD chooses to interpret the sentence as needing an exception, then one reading the sentence must understand the interpretation nullifies land use under SB12 and voids efforts for implementing a TDR program. Recognizing this may be extreme, if local government chooses to follow the exemption process, then the jurisdictions land use process needs to be modified.

To understand the TDR program options/concept, consider the requirements of Goal 14. Goal 14 requires the following *“[that there is a d]emonstrated need to accommodate long-range urban population growth requirements consistent with [Land Conservation and Development Commission] goals.”* Second, Goal 14 requires *“[that there is a n]eed for housing, employment opportunities, and livability”* (22OR LUBA 687 p. 22, lines 2-10).



In reviewing preliminary Oregon Department of Forestry (ODF) debris flow maps, SB12 TDRs should be primarily rural development credits because of the dynamics required for a rapidly moving landslide to generate. Therefore, until DOGAMI produces the published *“Further Review Area Maps”* local government may assume hazard area development would most always occur outside an Urban Growth Boundary (UGB); hence, TDR credits are defined as rural credits.

Agreements

SB12 provides local government the ability to facilitate formal inter-agency agreements to use rural credits in urban areas. Yet, without urban impact specific research local government may view increased density as a tool to shift UGB lines. In doing so, to exercise a rural to rural TDR credit local government must meet OAR 660-14-040 if development creates new lots/parcels less than those minimums required by law. Additionally, local government (county) in:

Section (3): must also show:

- (a) That Goal 2, Part II(c)(1) and (c)(2) are met by showing the proposed urban development cannot be reasonably accommodated in or through expansion of existing urban growth boundaries or by intensification of development at existing rural centers;
- (b) That Goal 2, Part II(c)(3) is met by showing the long-term environmental, economic, social and energy consequences resulting from urban development at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on other undeveloped rural lands, considering:

- (A) Whether the amount of land included within the boundaries of the proposed urban development is appropriate, and
- (B) Whether urban development is limited by the air, water, energy and land resources at or available to the proposed site, and whether urban development at the proposed site will adversely affect the air, water, energy and land resources of the surrounding area.

By definition, all land outside an acknowledged UGB and not the subject of an exception to Goal 14 is “rural” land. When amending an acknowledged comprehensive plan and/or zone designations for rural land, a local government must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14. (Churchill V. Tillamook County, 29 Or LUBA 68 (1995)). Again, circular logic requires interpretation of ORS 195.266(3). Therefore to exercise a TDR credit, development must purchase or transfer a credit much like sellable water or mineral right.

Goal 14 Rural Residential Rule and SB12

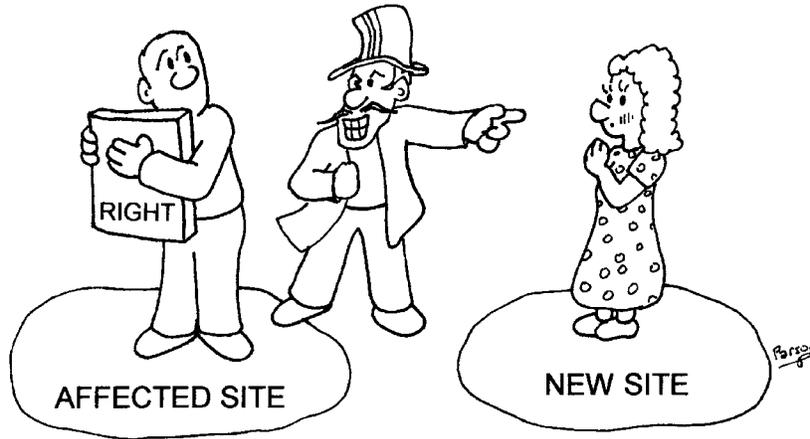
If Oregon’s Goal 14 rural residential rule maintains the ability to control creation of new lots/parcels and SB12 language cannot pass the rule then a SB12 TDR program needs to take a Goal 14 exception. Under Goal 14 if local government chooses to take an exception the jurisdiction must provide findings showing density is reached before implementing a TDR program. Without an exception, a TDR program will not have the ability to create new parcels whereby voiding SB12 language and limiting TDR credits to the same parcel or transferred parcel. Either way an owner of a credit would have a limited market. This process may be an acceptable method of transferring development in wake of Oregon’s Measure 7.

If receiving property is physically developed to the extent then an exception to the goal can be requested. This means a 5R property is ripe for discussion; however, a parcel of ten acres is in question. In Douglas County, a ten-acre parcel could be divided into two lots, but in some other jurisdictions this would be a problem. Problems arise when a county does not have an approved pre-Curry County decision comprehensive plan.

Douglas County

A large portion of Douglas County and Oregon is comprised of rural lands. A disproportionate amount of SB12 defined “Rapidly Moving Landslides” are located in rural versus urban areas (ODF/Douglas County independent research). Therefore, a TDR program must be driven by one of three ways; by, either rapid growth, development moratoriums, or market demand (high values or limited availability).

The program should be limited to single family dwellings, specifically “residential and accessory uses.” A program should be designed to be used in both rural and urban environments. Attention toward home site value versus value of the entire parcel might avoid economic or assessment issues when basing credit value projections. Clearly, the size of a home site must be researched before beginning a value-based discussion.



Without adequate communication, the public may not view government's role favorably.

Program pitfalls could include:

1. Notice requirements
2. Community acceptance as a receiving area
3. Acceptance by adjacent landowners
4. Facilitation of program and legal requirements.

The Oregon State Realtors Board Deputy Director Steve Hawes (also legal counsel) says, "TDRs or TDC's are too complex for Real Estate Agents. The program most likely will require attorneys to complete, unless someone has a speciality license to complete this type of transaction." Presently, Mr. Hawes does not know of an appropriate license.

Potentially, the SB 12 gives latitude toward creating new land use policy concerning siting of development. Conceptually, both policy and program development should have some type of a peer review committee comprising industry appraisers, relators, legal, DLCD, and local staff as members.

Economic

By allowing landowners to enter into a Transfer of Development Rights Program, the consumption of government emergency resources is reduced; whereby decreasing costs to local government. To understand, one needs to recognize a storm event can generate any number of rapidly moving landslides and people along with structures are sometimes minor obstructions, as a "Rapidly Moving Landslide" moves down-slope. Consequently, when human or man-made obstructions are considered in cost benefit analysis government resources are needed to facilitate the emergency and post emergency removal of life, property, and debris from the event site.

Taxation

Properties pre-"Further Review Area" identification are treated under jurisdictional taxation similar to other like properties. After the release of "Further Review Area"

maps by the Oregon Department of Geology and Minerals Industry to local government, properties once valued alike most likely will differ between map boundaries because of implied hazard risk.

In considering taxation matters, a landowner could attempt to manipulate the final development's tax structure depending on the outcome of a geotechnical report by requesting a zone change based on change of circumstances (e.g., proof of hazard). However, costs associated with a geotechnical report may be cost prohibitive depending on the base property tax paid. Local government may consider taxing development of individual approved or non TDR development parcels in "Further Review Areas" to cover costs of emergency services.

To facilitate this style of policy enhancement, the following conditions must be considered:

1. Are emergency services benefits consumed at different rates because of development location?
2. Can local government measure a benefit consumed?
3. Has local government the authority to distribute taxes by consumption?
4. Can local government treat emergency services costs the same as site development costs?
5. What are the political considerations when proposing fee-based emergency services? Solely on post geotechnical report findings.

Costs of development to local government include but are not limited to 1) planning and preparedness, 2) cleanup and disposal, and 3) repair of damaged. Repair of damage can include private along with public development. Resources for repair and damage may come from public or private insurance, grants, and loans.

So -- can local government consider development which occurs in a rapidly moving landslide area? Government (the public) most likely will incur costs associated with an event. Moreover, if development was encouraged to relocate the fiscal impact of an event should be reduced (recognizing limitless variables).

Taxation for Hazard Parcels

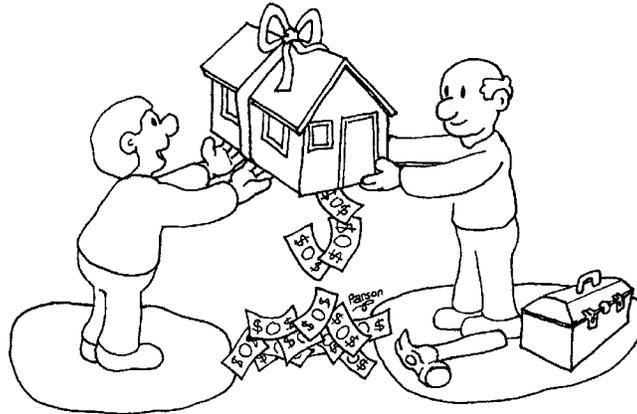
Taxing hazard-based parcels on proximity to a hazard is not a politically acceptable solution toward reducing development in landslide prone areas. Using evaluation taxing can be an effective solution toward providing an incentive or economic relief to encumbered parcels. Reduced taxes should be offset by new or increased transferred development.

Properties determined not developable should be considered for alternative taxing and benefits. Those benefits could range from open space zoning (a private park) to resource zone only taxation.

TDR Banks

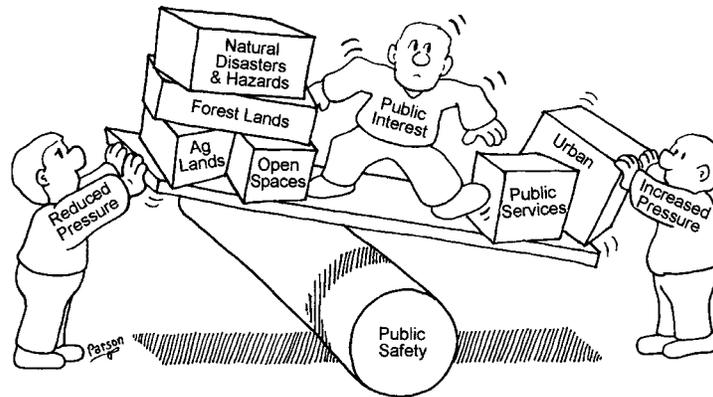
Should Oregon develop a TDR Bank to act as a buyer as last resort? How much investment would be required to operate? In 1987, the State of New Jersey established the New Jersey Pinelands Development Credit Bank and capitalized it with \$5 million from the state general fund. The bank must pay \$10,000 per credit.

Conclusion



A TDR program developed under the authority of SB12 relies on the interpretation of sentence two in paragraph three of ORS 195.266. There are two views that must be considered. Both views are positive, yet one streamlines the process while the other opens local government to litigation questions. In interpreting sentence three, the reader needs to assume TDRs are opportunities (optimistic view)-- with this assumption the reader agrees all new hazard area dwelling opportunities are legal land use actions that were legal, but could not have been exercised due to some constraint before October 23, 1999. This means a dwelling could have been approved under most circumstances; yet, because of some process a dwelling could not have been approved. If on the other hand, the reader has reservations toward implementing a TDR process - - then the reader can read sentence three as requiring operational requirements as those implemented after October 23, 1999.

In the first scenario, TDR receiving areas are distributed throughout a jurisdiction and credits should not be concentrated in one area. Using this hypothesis, one can deduce few implementational problems in relation to statewide planning laws, rules, and goals. When we look at the second option or scenario, we see any type of rural SB12 TDR program needing to take a jurisdiction wide exception to Goal 14 to avoid increased urbanization issues. Reasoning for the Goal 14 exception would be based in an interest toward improving public safety whereby making the urbanization issue moot. Pre SB12 Oregon, "Further Review Area" research suggests few TDR credits could be exercised during any one specific period in time unless some type of TDR brokerage program was developed. Assuming local government chooses not to develop a TDR bank or a brokerage program during economic analysis suggests few credits would be available to urban design projects. Considering the cross jurisdictional use of credits, a TDR program may choose to limit use of credits from other jurisdictions to avoid Goal 14 issues. Urban jurisdictions may decide to accept credits and direct development in specific areas to stimulate economic development.



Planner balancing the Public Interest.

TDR programs range from complex to simple in design depending on jurisdictional desires. TDRs are tools used by local government to implement transfers of development from undesirable areas to areas meeting some type of community need. The definition of an undesirable area can range from development in a hazard prone areas to development in preservation areas (e.g., farmland, historic, and cultural/environmental sensitive areas).

A Transfer of Development Rights program as it relates to SB 12 focuses only on public safety and ignores urbanization issues associated with increased density. If land use in rural Oregon focuses policy toward Goal 3, 4, 5, and 7 as a balance for Goals 11 and 14, then public safety shift in the equilibrium toward Goal 11 and 14. This means equilibrium may make a lateral shift versus creating a vector or vertical inequity shift. This shift or series of shifts may should only impact Goals 11 and 14, in a negligible manner.

As local government develops a TDR program, the populous needs to explore development incentives to provide tax relief for encumbered sending areas. In doing so, local government should add a program component that provides methods to transfer property ownership conservatorship. Conservatorship might be based toward preservation of open spaces.

Open spaces, a product of goal 5, should be improved under a TDR Program. Ideally, property impacted under SB12 becomes hazard property that can not be harvested or developed in such a manner that has economic rewards. Theoretically, hazard properties carry a high risk creating additional liability. Because of increased recognition liability there is a strong possibility that property selling a development right would either abandon ownership or seek judgement toward local government to address compensation. In either format, local government will face costs; however, costs should be reduced over time. Property abandonment due to increased hazard liability may consider a takings due to current forest practice rules.

Persons entering into a TDR exchange will need to sign a 150-day rule waiver. The waiver will allow adequate time for local government to facilitate the exchange between

all participants. A specific time frame can be incorporated into the waiver language as an agreement to complete between parties. At this point in the process, it is encouraged to reframe form allowing adjacent parcel owners party status.

Timber versus development opportunities are a concern when local government chooses not to notify the public concerning a landuse/dwelling approval. Local government can operate under the scope of a land use variance by using a ministerial decision. This is key to understanding community needs when siting development. If needs are high enough then local government can rescind all fees associated with a TDR exchange.

Operational TDRs

The SB12 TDR concept needs to be limited to developable parcels of a buildable size. Those acceptable parcels must be driven by conditions that could approve existing dwellings. Conditions that would make a parcel not acceptable could include high ground water, overlay zoning, and hazard prone areas. It's the intention for SB12 TDR credits to be placed in areas evaluated as having a low risk for geological hazards. Realistically, TDR credits should not be used to trade one geological hazard for another geological hazard.

Features of an Effective TDR Program

TDR programs have several features each which can be used to gauge the impact or effectiveness of focused development. Those features are described as:

1. Ease of understanding

To have an effective TDR program, a program should be simple and easy for all parties to understand (e.g., landowners and the public). Citizens and leadership of a community entering into a TDR program must be totally committed to the process. An effective TDR program requires long term administrative management. Under SB12 tracking of TDR transactions is mandated to local government. Yet, without ease of understanding developers may choose to continue development per jurisdictional protocols like variances and avoid purchasing development rights unless the zoning process is restructured to complicate existing methodology.



2. Managed Growth

TDR programs should be incorporated into a community's comprehensive plan. The county, municipality, or regional planning area must not only have a solid comprehensive plan, but zoning ordinances that support TDR programs. TDRs transferred into extreme rural areas where there is little

or no development occurring because there is no incentive to exercise a development credit. Additionally, use of a TDR credit in an extreme rural area violates the spirit of Goal 3 and Goal 4. Within receiving areas, the county, municipality, or regional plan needs to include policies, zoning ordinances, and potential capital improvement programs that will assure communities in the designated growth areas that public facilities are not overloaded as a result of a TDR density.

3. Adequate Incentives

Developers need adequate incentives to sell their development rights. Also, receiving areas must be attractive enough for developers to want to purchase rights. Specifically, the value of development rights should be reasonably predictable and should adequately reflect their true value in order to encourage participation.

4. Careful Management

Trained planning staff must manage the program to identify and authorize the use of a development credit. Program staff must understand the fundamentals of planning and public relations to explain the program to all interested persons.

Jurisdictions should be aware when parcels are determined not buildable (by a geotechnical report) they should remove it from the buildable lands inventory. In approaching this removal, local government should be aware of ORS 197.186 (1) which references open space designations. This ORS is referenced because individual interpretation should afford opportunities to designate (impacted sending) properties. An open space designation may be another benefit when harvesting resources in not an option. ORS 197.186(1) reads as:

At periodic review under ORS 197.633 next following approval of an application under ORS 308A.309, the local government shall remove any lot or parcel subject to the [open space] application from any inventory of buildable lands maintained by the local government. The local government shall compensate for the resulting reduction in available buildable lands either by increasing the development capacity of the remaining supply of buildable lands or by expanding the urban growth boundary.

Use of this ORS by local government means, as a TDR is exercised and an open space determination is approved, local government needs to remove the impacted property from the lands inventory and shift urban density or expand the Urban Growth Boundary (UGB). For jurisdictions looking for a mechanism to expand the UGB, the opportunity for exploitation is ripe.

Additionally, a TDR process could also include a method of land use approval like that of resource lands. If noncontiguous acreage is considered in resource dwelling approval and parcels are not joined as one lot of record then the non-dwelling parcel is

only covenanted against development and can be sold.

Recommendations



Local government should consider approaching TDRs as a unique tool that mitigates environmental, economic, social and energy (transportation) issues for rural areas. Because Senate Bill 12 tightly restricts development in landslide areas, each item listed by itself could constitute the need for an exception to Goal 2 and Goal 14 (ORS 197.732 and OAR 660-004-0025).

It is felt that transferred development directed into existing rural development areas under this proposal should not under pre-rural residential rules violate Goal 14.

197.230: Considerations; finding of need required for adoption or amendment of a goal.

(1) In preparing, adopting and amending goals and guidelines, the Department of Land Conservation and Development and the Land Conservation and Development Commission shall:

(a) Assess:

(A) What economic and property interests will be, or are likely to be, affected by the proposed goal or guideline;

(B) The likely degree of economic impact on identified property and economic interests; and

(C) Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

(b) Consider the existing comprehensive plans of local governments and the plans and programs affecting land use of state agencies and special districts in order to preserve functional and local aspects of land conservation and development.

(c) Give consideration to the following areas and activities:

(A) Lands adjacent to freeway interchanges;

- (B) Estuarine areas;
- (C) Tide, marsh and wetland areas;
- (D) Lakes and lakeshore areas;
- (E) Wilderness, recreational and outstanding scenic areas;
- (F) Beaches, dunes, coastal headlands and related areas;
- (G) Wild and scenic rivers and related lands;
- (H) Flood plains and areas of geologic hazards;
- (I) Unique wildlife habitats; and
- (J) Agricultural land.

(d) Make a finding of statewide needs for the adoption of any new goal or the amendment of any existing goal.

(e) Design goals to allow a reasonable degree of flexibility in the application of goals by state agencies, cities, counties and special districts.

(2) Goals shall not be land management regulations for specified geographic areas established through designation of an area of critical state concern under ORS 197.405.

(3) The requirements of subsection (1)(a) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule.

(4) The commission may exempt cities with a population less than 10,000, or those areas of a county inside an urban growth boundary that contain a population less than 10,000, from all or any part of land use planning goals, guidelines and administrative rules that relate to transportation planning. [1973 c.80 s.34; 1977 c.664 s.17; 1981 c.748 s.17; 1983 c.740 s.50; 1995 c.299 s.2; 1999 c.784 s.1]

If someone decides to argue against, TDR uses they should first acknowledge the program mandate of SB 12. To act otherwise would require a legislative action, one needs to gain legislative action.

Solutions to TDR Problems

1. Have the state purchase properties impacted by SB12
2. Have the legislature enact new legislation to streamline the transfer process
3. Take an exception to Goals by weighing public policy safety concerns
4. Abandon the TDR program as it relates to SB12.

Program Recommendation

In developing a Transfer of Development Rights program in Oregon, local government should view TDR programs as density transfers. Density transfers should be treated much like a water/mineral right with the exception of not issuing a stock certificate. However, this right should be treated as an additional land use approval bonded to development without

exchangeable certificates. In another words, private industry should facilitate the exchange of credits without local government intervention. Completion of a credit exchange would require parties to document the process and provide jurisdictional proof of redemption. The sending property would record with the County Clerk findings stating completion of the transaction and placement of a redemption covenant.



Appendix A

Policy Recommendation

[Governing body] finds that residential growth in “Further Review Areas” leads to restrictions on property development. In the interest of reducing potential for serious bodily injury or death and/or property damage or destruction as a result of a rapidly moving landslide, the [governing body] finds that it is in the public interest to implement a Transfer of Development Rights program within the [local government’s] jurisdiction. Hence, forward a Transfer of Development Rights program in [local government’s] jurisdiction shall be called a Transfer of Development Credit Program.

The purpose of this program is to promote public health, safety and welfare, and to provide an alternative to development in landslide prone areas in [local government]. This policy is not to be construed as in any way to modify or abridge Oregon State or federal law.

Appendix B

Disclosure Requirement

Acknowledgment of the attached Disclosure Statement is required by all program participants. Participants shall complete and show proof of completion of all requirements listed below before recording final transaction documentation:

1. To exercise a Transfer of Development Credit, upon the issuance of a land use development approval (including but not limited to subdivision or placement approvals), the owners of both properties shall sign and record with the County Recorder covenants containing a Disclosure Statement and a Restrictive Development Agreement on forms provided by the Planning Department at time of recording the Transfer of Development Credit transaction.
2. Upon any transfer of a real property development credit by sale, exchange, installment, or land sale contract the transferor shall provide a statement containing the language set forth below and the seller shall provide a signed sealed copy of this notice by the purchaser recorded with the County Recorder in conjunction with any deed conveying the interest in real property (Exhibit A) to the [local government].
3. All receipts associated with completing the Transfer of Development Credit transaction shall be made part of the final approval by [local government].

REAL ESTATE TRANSFER DISCLOSURE STATEMENT

This disclosure statement concerns the real property situated in the County of _____, State of Oregon, described as:

(See Legal Description: Attached Exhibit A)

This statement is a disclosure of geological condition of the above described property in compliance with Land Use Development Ordinance _____, in _____ County, 20___. This is not a warranty of any kind by the seller(s) or any agents(s) representing any principal(s) in this transaction, and is not a substitute for any inspections or warranties the principal(s) may wish to obtain.

**I.
Seller's Information**

The seller discloses the following information with the knowledge that even though this is not a warranty, prospective buyers may rely on this information and information contained in the geotechnical report in deciding whether and on what terms to purchase the subject property or property with development credit. The seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property or credit. The following are representations made by the seller(s) as required by _____ County and is not the representation of the agent(s), if any. This information is a disclosure and is not intended to be part of any contract between the buyer and seller.

1. The [local government] has reviewed development opportunities for the above described property and has determined the seller is eligible to sell a development credit. The [local government] has established a grievance committee to assist in the resolution of any disputes which might arise between residents of this jurisdiction regarding selling development credits.
2. Additional requirements to be added here.

The seller certifies that the information herein is true and correct to the best of sellers' knowledge as of this date signed by the seller.

Seller _____ Date _____
Seller _____ Date _____

**II.
Agreement**

Buyer(s) and seller(s) may wish to obtain professional advice and/or inspections of the property and to provide for appropriate provisions in a contract between buyer and seller(s) with respect to any advice/inspections/defects.

I/We acknowledge receipt of a copy of this statement.

Seller _____ Date __/__/20__ Buyer _____ Date __/__/20__

Seller _____ Date __/__/20__ Buyer _____ Date __/__/20__

Agent (Broker) representing seller _____ by _____ Date __/__/20__
(Associate Licensee or Broker-Signature)

Agent (Broker) representing seller _____ by _____ Date __/__/20__
(Associate Licensee or Broker-Signature)

State of Oregon, On this _____ day of _____, _____.

SS before me, the undersigned Notary Public,
personally appeared County of _____.

_____ personally known to me. _____ provided to me on the basis of satisfactory evidence to be the person(s) whose name(s) _____ subscribed to the within instrument and acknowledge that _____ executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

If either the Seller or Buyer refuses to sign this disclosure statement, all conditions and approvals concerning this transaction is null and void from this date forward. By affixing and signing the above declaration into statement one conditional of approval is met to facilitate transfer of a development credit.

Appendix C

GOAL EXCEPTIONS

197.732 Goal exceptions; criteria; rules; review.

(1) A local government may adopt an exception to a goal if:

(a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;

(b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or

(c) The following standards are met:

(A) Reasons justify why the state policy embodied in the applicable goals should not apply;

(B) Areas which do not require a new exception cannot reasonably accommodate the use;

(C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and

(D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

(2) "Compatible," as used in subsection (1)(c)(D) of this section, is not intended as an absolute term meaning no interference or adverse impacts of any type with adjacent uses.

(3) The commission shall adopt rules establishing:

(a) Under what circumstances particular reasons may or may not be used to justify an exception under subsection (1)(c)(A) of this section; and

(b) Which uses allowed by the applicable goal must be found impracticable under subsection (1) of this section.

(4) A local government approving or denying a proposed exception shall set forth findings of fact and a statement of reasons which demonstrate that the standards of subsection (1) of this section have or have not been met.

(5) Each notice of a public hearing on a proposed exception shall specifically note that a goal exception is proposed and shall summarize the issues in an understandable manner.

(6) Upon review of a decision approving or denying an exception:

(a) The board or the commission shall be bound by any finding of fact for which there is substantial evidence in the record of the local government proceedings resulting in approval or denial of the exception;

(b) The board upon petition, or the commission, shall determine whether the local government's findings and reasons demonstrate that the standards of subsection (1) of this section have or have not been met; and

(c) The board or commission shall adopt a clear statement of reasons which sets forth the basis for the determination that the standards of subsection (1) of this section have or have not been met.

(7) The commission shall by rule establish the standards required to justify an exception to the definition of "needed housing" authorized by ORS 197.303 (3).

(8) As used in this section, "exception" means a comprehensive plan provision, including an amendment to an acknowledged comprehensive plan, that:

(a) Is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability;

(b) Does not comply with some or all goal requirements applicable to the subject properties or situations; and

(c) Complies with standards under subsection (1) of this section.

(9) An exception acknowledged under ORS 197.251, 197.625 or 197.630 (1) (1981 Replacement Part) on or before August 9, 1983, shall continue to be valid and shall not be subject to this section. [1983 c.827 s.19a; 1995 c.521 s.3]

Appendix D

Conditional Entry

To enter the program, the following conditions must be met:

1. The legal owner of record must be willing to enter into the program.
2. A geo-technical report must state there is no alternative sending site available that does not require mitigation.
3. The sending site must have been able to gain land use approval to develop. This requirement is as if no landslide overlay existed.
4. There must not be any pre-existing covenants, covenants, or restrictions prohibiting site development. Hence, making a parcel restricted from development whereby a participant cannot sell a credit because an opportunity to develop is not present.
5. The site owner must post a clear title to the parcel or an irrevocable letter from the mortgage holder permitting sale of a development credit.
6. The site owner(s) must act as one party unless prohibited Oregon under law. A credit being marketed shall be considered one unit and no fraction may be sold.
7. A credit shall not be sold to receiving sites without land use approval.
8. All transaction costs incurred by [local government] shall be reimbursed **by** the seller.

Appendix E

Senate Bill 576
Sponsored by COMMITTEE ON JUDICIARY
(at the request of Deschutes County)

CHAPTER 573 AN ACT

Relating to transferable development credits.
Be It Enacted by the People of the State of Oregon:

SECTION 1. { +

(1) The governing body of a city or county is authorized to recognize a severable development interest in real property. The governing body of the city or county may establish a system for the purchase and sale of development interests. The interest transferred shall be known as a transferable development credit. A transferable development credit shall include the ability to establish in a location in the city or county a specified amount of residential or nonresidential development that is different from development types or exceeds development limitations provided in the applicable land use regulations for the location. All development authorized or approved using transferable development credits shall comply with the land use planning goals adopted under ORS 197.225 and the acknowledged comprehensive plan.

(2) The ability to develop land from which credits are transferred shall be reduced by the amount of the development credits transferred, and development on the land to which credits are transferred may be increased in accordance with a transfer system formally adopted by the governing body of the city or county.

(3) The holder of a recorded mortgage encumbering land from which credits are transferred shall be given prior written notice of the proposed conveyance by the record owner of the property and must consent to the conveyance before any development credits may be transferred from the property.

(4) A city or county with a transferable development credit system shall maintain a registry of all lots or parcels from which credits have been transferred, the lots or parcels to which credits have been transferred and the allowable development level for each lot or parcel following transfer.

(5) A city or county, or an elected official, appointed official, employee or agent of a city or county, shall not be found liable for damages resulting from any error made in:

- (a) Allowing the use of a transferable development credit that complies with an adopted transferable development credit system and the acknowledged comprehensive plan; or
- (b) Maintaining the registry required under subsection (4) of this section. + }

Passed by Senate May 5, 1999
President of Senate: June 29, 1999

Passed by House June 3, 1999
Speaker of House: June 30, 1999

Signed by Governor: July, 8, 1999

Appendix F

OAR 660-006-0055

New Land Division Requirements in Agriculture/Forest Zones

(1) A governing body shall apply the standards of OAR 660-006-0026 and 660-033-0100 to determine the proper minimum lot or parcel size for a mixed agriculture/forest zone. These standards are designed: To make new land divisions compatible with forest operations; to maintain the opportunity for economically efficient forest and agriculture practices; and to conserve values found on forest lands.

(2) New land divisions less than the parcel size established according to the requirements in section (1) of this rule may be approved for any of the following circumstances:

(a) For the uses listed in OAR 660-006-0025(3)(m) through (o) and (4)(a) through (n) provided that such uses have been approved pursuant to OAR 660-060-0025(5) and the land division created is the minimum size necessary for the use.

(b) For the establishment of a parcel for a dwelling on land zoned for mixed farm and forest use, subject to the following requirements:

(A) The parcel established shall not be larger than five acres, except as necessary to recognize physical factors such as roads or streams, in which case the parcel shall not be larger than 10 acres;

(B) The dwelling existed prior to June 1, 1995;

(C)(i) The remaining parcel, not containing the dwelling, meets the minimum land division standards of the zone; or

(ii) The remaining parcel, not containing the dwelling, is consolidated with another parcel, and together the parcels meet the minimum land division standards of the zone;

(D) The remaining parcel, not containing the dwelling, is not entitled to a dwelling unless subsequently authorized by law or goal.

(E) The minimum tract eligible under paragraph (b) of this subsection is 40 acres.

(F) The tract shall be predominantly in forest use and that portion in forest use qualified for special assessment under a program under ORS chapter 321.

(G) The remainder of the tract shall not qualify for any uses allowed under ORS 215.213 and 215.283 that are not allowed on forest land.

(c) To allow a division of forest land to facilitate a forest practice as defined in ORS 527.620 that results in a parcel that does not meet the minimum area requirements of subsection (1). Parcels created pursuant to this subsection:

(A) Shall not be eligible for siting of new dwelling;

(B) Shall not serve as the justification for the siting of a future dwelling on other lots or parcels;

(C) Shall not result in a parcel of less than 35 acres, except:

(i) Where the purpose of the land division is to facilitate an exchange of lands involving a

governmental agency; or

(ii) Where the purpose of the land division is to allow transactions in which at least one participant is a person with a cumulative ownership of at least 2,000 acres of forest land; and

(D) If associated with the creation of a parcel where a dwelling is involved, shall not result in a parcel less than the minimum lot or parcel size of the zone.

(3)(a) An applicant for the creation of a parcel pursuant to subsection (2)(b) of this section shall provide evidence that a restriction on the remaining parcel, not containing the dwelling, has been recorded with the county clerk of the county where the property is located. The restriction shall allow no dwellings unless authorized by law or goal on land zoned for forest use except as permitted under subsection (2) of this section.

(b) A restriction imposed under this subsection shall be irrevocable unless a statement of release is signed by the county planning director of the county where the property is located indicating that the comprehensive plan or land use regulations applicable to the property have been changed in such a manner that the parcel is no longer subject to statewide planning goals pertaining to agricultural land or forest land.

(c) The county planning director shall maintain a record of parcels that do not qualify for the siting of a new dwelling under restrictions imposed by this subsection. The record shall be readily available to the public.

(4) A landowner allowed a land division under subsection (2) of this section shall sign a statement that shall be recorded with the county clerk of the county in which the property is located, declaring that the landowner will not in the future complain about accepted farming or forest practices on nearby lands devoted to farm or forest use.

Stat. Auth.: ORS 183, ORS 197.040, ORS 197.230 & ORS 197.245

Stats. Implemented: ORS 197.040, ORS 197.230, ORS 197.245, ORS 215.213, ORS 215.283, ORS 215.700, ORS 215.705, ORS 215.720, ORS 215.740, ORS 215.750, ORS 215.780 & Ch. 792, 1993 OL

Hist.: LCDC 1-1990, f. & cert. ef. 2-5-90; LCDC 7-1992, f. & cert. ef. 12-10-92; LCDC 1-1994, f. & cert. ef. 3-1-94; LCDC 3-1996, f. & cert. ef. 12-23-96

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Land Use Appeals Board. Caine V. Tillamook County, 22OR LUBA 687 (1992).

Oregon Revised Statute. ORS 195.235. Policy

Oregon Revised Statute. ORS 195.260. Duties of local governments, state agencies and landowners in landslide hazard areas.